IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1261

DETROIT TYPOGRAPHICAL UNION NO. 18, INTERNATIONAL TYPOGRAPHICAL UNION, *Petitioner,*

v.

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, THE DETROIT NEWS, and THE DETROIT FREE PRESS, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITIONER'S SUPPLEMENTAL MEMORANDUM

Petitioner files this supplemental memorandum to call to this Court's attention a recent, unreported memorandum opinion of the Third Circuit that bears directly on the appropriateness of granting certiorari in this case. That opinion, which is reprinted in the Appendix herein, is entitled *Newspaper, Newsprint, Mag-*

azine, and Film Delivery Drivers, Local Union No. 211, Appellant, v. *Pittsburgh Press Company,* Appellee, No. 72-2141, dated December 26, 1972.[1]

The Third Circuit's memorandum opinion was rendered six days after the Sixth Circuit's opinion in the instant case, which was dated December 20, 1972. But the Third Circuit obviously was not aware of the Sixth Circuit's opinion when it wrote its memorandum opinion. Nonetheless, the Third Circuit did make approving references to the oral opinion of the District Court for the Eastern District of Michigan in the instant proceeding, as reported at 81 LRRM 2797. And the Third Circuit's action in granting enforcement of the status quo clause pending the appeal is tantamount to a conflict with the Sixth Circuit's refusal to enforce a status quo clause.

The *pendente* restraint issued by the Third Circuit in this *Newspaper Delivery Drivers* case is precisely the kind of enforcement of a status quo clause that it had earlier decreed in June of 1972 pending the appeals in *Pittsburgh Newspaper Printing Pressmen's Union No. 9, et al.* v. *Pittsburgh Press Co.* (81 LRRM 2438, 2439), referred to at page 12 of the Petition for Certiorari herein.[2] More importantly, that kind of en-

---

[1] Petitioner's counsel were unaware of this memorandum opinion prior to the filing of the Petition for Certiorari on March 15, 1973.

[2] The appeals in *Printing Pressmen's Union No. 9* were argued orally to the Third Circuit on April 3, 1973, and are under advisement by that court. That court is aware not only of the Sixth Circuit's decision in the instant proceeding but of the pendency before this Court of the Petition for Certiorari herein. Should the Third Circuit follow its tentative thinking as indicated herein and order the enforcement of the status quo clause in the *Printing Pressmen's Union No. 9* proceedings, that result would directly conflict with the result reached below by the Sixth Circuit.

forcement reflects an exercise of judicial power or prerogative that the Sixth Circuit has here said was beyond the scope of a federal court's jurisdiction under § 301(a) of the Labor-Management Relations Act. Additionally, the rationale now supplied by the Third Circuit in justification of its twice-exercised enforcement of a status quo clause pending an appeal reveals a concept of the irreparable injury necessary to enforcement that is totally different from and in conflict with the concept expressed by the Sixth Circuit.

Giving due weight to the fact that the Third Circuit has been dealing so far only with temporary enforcement of the status quo clause pending an appeal, the extent of the differences between the two Circuits may be expressed as follows:

Third Circuit	*Sixth Circuit*
1. "Once it is found that the issues [on the merits of the dispute] are arbitrable, then it is arguable that the matter is properly a grievance subject to the status quo section. In the present posture of this appeal, we do not resolve this issue. We hold simply that at this time we cannot rule, without more, that Section 18 [of the agreement on which the company relied in justification of its work change] is absolutely controlling, precluding any possibility of applying the status quo section." See page 5a of Appendix hereto, *infra*.	1. "It was not the prerogative of the District Court to construe the 'status quo' clause of the contract or to make a factual determination as to whether there has been a violation of this clause. We see no reason why this issue, along with the basic underlying dispute between the parties, cannot be determined by arbitration." See page 5a of Appendix to Petition for Certiorari.

Third Circuit

2. "Accepting the premise that the issues [on the merits] are arbitrable, we cannot, at this stage, rule, as a matter of law, that violation of the status quo during arbitration is not in itself an irreparable harm to the plaintiff.

"The plaintiff is a union. The status quo section obviously represents a union victory at the collective bargaining table which created the 1972 agreement. The union contends that any rupture of this status constitutes irreparable harm. Self-descriptive by nomenclature, irreparable harm, as a ground for equitable relief, is what cannot be repaired, restored, put back again, atoned for, but may exist although the injury is compensable in damages and is not very great where there is actual and substantial injury of such character that the law cannot give adequate compensation or fair or reasonable redress. [Citing District Court oral opinion in the instant *Detroit* case.]

"Accordingly, we hold that whether the district court erred in its finding of irreparable harm is an

Sixth Circuit

2. "The Union contends that the irreparable injury to it is not the loss of jobs or wages, but the loss of its bargain with the employer on the 'status quo' provision. The Union argues that the 'status quo' clause does for it what the no-strike clause does for the newspaper, and that the violation of the 'status quo' clause has resulted in destroying this equality of position which is the essence of the collective bargaining agreement. The Union asserts that the resulting damage is not financial but is the consequent appearance to its members that the Union is helpless to discharge its obligations, which is its essential duty and function, and that this loss of confidence of the members would be irreparable. The District Court made no finding that this constitutes irreparable harm, and we do not consider that it could be so construed as irreparable harm on the basis of the record in this case." See page 8a of Appendix to Petition for Certiorari.

Third Circuit

arguable question; one which will be resolved at the decision on the merits of this appeal. Pending disposition thereof, we are constrained to grant an injunction pending appeal. . . . It is the thrust of appellant's argument that the loss of the status quo is irreparable. Although we do not decide that issue, we will preserve that status. To hold otherwise would dissipate completely the very status which is central to this litigation and also deprive appellant of the opportunity of litigating the issue." See pages 6a-7a of Appendix hereto, *infra*.

Sixth Circuit

Thus the Third Circuit has given express recognition to the possibility that a violation of the status quo clause may in itself constitute sufficient irreparable harm to the union's status and to the collective bargaining process to justify the enforcement of the status quo clause. To that extent, the memorandum ruling is at odds with the Sixth Circuit's blanket refusal to acknowledge that the violation of the clause is or can be a *per se* irreparable injury. See Petition for Certiorari, pages 19-21.

Only a few words need be added here in response to the respondents' Brief in Opposition, which serves to highlight and compound the confusion permeating the Sixth Circuit's opinion:

(1) Respondents seemingly concede (Br. Opp. 4) that the first and central holding of the Sixth Circuit is that a federal court lacks any "prerogative" to construe the status quo clause or to make a factual determination as to a violation thereof. The court said that such matters must be left to the arbitrator, acting at the termination of the pre-arbitration period. But respondents fail to explain how the arbitrator could ever make the status quo clause effective during the pre-arbitration period. An arbitrator's award of damages or back pay is not the equivalent of the suspension of unilateral work changes ordered by the employer during the pre-arbitration period, which suspension is the sole object of the status quo clause. Unless such a suspension is made effective during the pre-arbitration period, the clause is rendered totally impotent.[3]

(2) Respondents, in defending the second alternative holding of the Sixth Circuit (Br. Opp. 6-9), fail to explain how federal courts suddenly acquire the "prerogative" to construe the status quo clause and to determine a violation thereof when confronted with proof of irreparable injury by the union or its affected members. And they fail to explain the Sixth Circuit's insistence that even where the federal courts can enjoin violations of the status quo clause the arbitrator still retains final authority to determine the applicability of the clause in the first instance. See page 9a

---

[3] Respondents assert (Br. Opp. 7) that if the arbitrator's award cannot fully remedy a violation of the clause "irreparable injury" might be occurring so as to permit injunctive relief pending arbitration. But this is a meaningless argument in light of the Sixth Circuit's notion that "irreparable injury" must take the form of discharge, which could be remedied by the arbitrator. What other form of "irreparable injury" would satisfy the Sixth Circuit's idea of when a court injunction can issue?

of Appendix to Petition for Certiorari, and page 18 of Petition.

(3) Respondents, in reiterating (Br. Opp. 6-7) the Sixth Circuit's requirement that proof of "irreparable injury" precede judicial enforcement of the status quo clause pending arbitration, fail to recognize that the status quo clause is meant to be effective and enforced irrespective of whether a change in working conditions is accompanied by "irreparable injury" in the form of discharge or lay-off. That is precisely why the Sixth Circuit's insistence on a discharge as the price of judicial enforcement is contrary to the purpose and thrust of the status quo clause and the arbitration process of which it is a part. And that is why the District Court below and the Third Circuit in the attached *Newspaper Delivery Drivers* case are more faithful to the concept of the status quo clause in recognizing that an alteration of the status quo by any means justifies enforcement of this vital part of the arbitration *quid pro quo*.

(4) Respondents' final assertion (Br. Opp. 8-9) that a federal court dare not ignore the procedural mandates of § 7 of the Norris-LaGuardia Act emphasizes anew the need for reminding the lower federal courts and the labor bar that the arbitration process and the enforcement thereof are "not a part and parcel of the abuses against which the [Norris-LaGuardia] Act was aimed." *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 458 (1957).[4]

[4] Respondents, in support of their broad assertion that § 7 indiscriminately applies, cite *United States Steel Corp.* v. *United Mine Workers*, 456 F.2d 483, 487-8 (C.A. 3, 1972), which merely held that in a § 301 suit reasonable attorney fees could be recovered pursuant to § 7. The Third Circuit recognized that many other provisions of § 7 are inapplicable.

CONCLUSION

These various considerations augment the reasons why certiorari should be granted to review the judgment and opinion of the Sixth Circuit in this case.

Respectfully submitted,

GERHARD P. VAN ARKEL
EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D. C. 20036

SHELDON L. KLIMIST
2460 First National Building
Detroit, Michigan 48226

Counsel for Petitioner

April 18, 1973